Supreme Court, U.S.
FILED

96 891 DEC 2 1996

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER 11, 1996

ALBERT W. JORDAN
DISABLED VETERAN — PETITIONER

VS

KENTON COUNTY OF
KENTUCKY BOARD OF
EDUCATION, ET AL — RESPONDENTS

MOTION FOR LEAVE TO PROCEED AS A VETERAN

The petitioner asks for leave to file the attached petition for a writ of certiorari with an exemption from the payment of fees or court costs under Supreme Court Rule 40.

The petitioner also requests leave to proceed on papers as required by Rule 33.2.

Despite his veteran status, petitioner has been required (under protest) to pay fees in the following courts:

UNITED STATES COURT FOR THE EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's declaration in support of this Motion is attached hereto.

Albert W Jordan

pro se

51 PP

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED AS A VETERAN

I, Albert Jordan, am the petitioner in the above-titled case. In support of my motion to proceed with an exemption from the payment of fees or court costs under Supreme Court Rule 40, and for leave to proceed under papers as required by Supreme Court Rule 33.2, I claim veteran status, and I am entitled to redress.

I swear that I am an honorably discharged Navy veteran with a service-connected disability rating with the Veteran's Administration of one-hundred per cent.

I am suing my pre-service employer and the retirement system in which I am vested so that I receive each reemployment right to which I am entitled under 38 U.S.C. s 4301 *et. seq.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 25, 1996

Albert W. Jordan

Nov. 25, 1996
Notary Public
Carol Rae Howard
Commission Expires
5/20/99

No. _____

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ALBERT W. JORDAN, DISABLED VETERAN - PETITIONER

VS.

KENTON COUNTY OF KENTUCKY BOARD OF EDUCATION, ET AL - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALBERT W. JORDAN

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JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided my case was September 6, 1996.

[x] A timely petition for rehearing en banc was denied by the United States Court of Appeals for the Sixth Circuit on the following date: October 23, 1966, a copy of the order denying rehearing appears at Appendix B pg.

The jurisdiction of this Court is invoked under 28 U.S.C § 1245(1).

TABLE OF AUTHORITIES

CASES — PAGE NUMBER

White's Landing Fisheries, Inc. v. Buchholzer, 29 F. 3d at 321-32 (Sixth Circuit 1994) — 11

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2 of the Constitution of the United States

"The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1. "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4. The validity of the public debt of the United States authorized by law including debts incurred for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned.

Public Law 93-508, December 3, 1974 as Amended by

Public Law 94-286, May 14, 1976

Chapter 43 - Veteran's Reemployment Rights

Section 2021 Right to reemployment of inducted persons; benefits protected

Section 2022 Enforcement procedures

Title 38, United States Code Chapter 43

Chapter 42 - Employment and Training of Veterans

Section 4211 Special Disabled Veteran

Section 4212 Veterans employment emphasis under federal contracts

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Albert Jordan, a teacher and football coach at Scott High School of Kenton County Board of Education, resigned from his coaching position after head coach David Browning tried to prevent him from obtaining the Rank I teaching credential, along with a considerable raise in salary. The reason Browning gave for denying Jordan permission to arrive one hour late for two days of summer practice to attend classes at the university was that Jordan, a relatively new teacher, with two master's degrees, would earn as much salary as Browning, who held a bachelor's degree with several years of experience.

Albert Jordan arrived one hour late for practice on two consecutive days despite David Browning's tantrums. Coach Browning, a very short man with a bad complexion and severe Napoleonic disorder, became so peevish during the following season that Jordan felt compelled to resign his football coaching position.

Coach Browning, who frequently boasted that he actively campaigned for several school board members during elections, stated he not the administrators micro-managed Scott High School.

In the meantime Albert Jordan wrote and photographed for the Kentucky section of *The Cincinnati Enquirer* and taught evening courses at several local colleges and universities. Albert Jordan volunteered to teach journalism courses and publish the student newspaper which involved a

supplemental contract of several hundred dollars, since he had extensive training and practical publishing experience.

Despite his best efforts, the administration began supervising Jordan's classes excessively and nit-picking his work. Although Albert Jordan received very positive comments for his evening teaching at the university from the administration and students, Kenton Board administrators began giving him lower evaluations.

Because of a lifelong interest in becoming a military officer and because of the high cost of private pilots training along with becoming disillusioned with the education system, Albert Jordan investigated naval aviation. He qualified, and he was accepted into the flight program at Naval Air Station Pensacola, Florida.

In the meantime, Albert Jordan was eligible for tenure, however, the Navy recruiter urged him to resign from teaching and enter the military as soon as possible. Hoping to make the Navy a career and to leave education permanently, Albert Jordan pressed the school board for salary credit that they had denied him, and when that issue was resolved, he resigned and he withdrew his retirement funds from the Kentucky Teacher's Retirement System.

During a line of duty training exercise conducted by marine corps trainers and supervised by navy officers, Albert Jordan suffered a laceration to the head, a concussion, and a dislocated kneecap. As a result Albert Jordan was diagnosed as having damage to the brainstem,

tinnitus, high blood pressure, and depression among other related problems. After months of treatment as an outpatient, the Navy honorably discharged him with a very vaguely-worded medical sounding discharge, despite not granting Albert Jordan a medical review.

Once discharged Albert Jordan was informed that he was legally entitled to his pre-service employment. On June 25, 1982, Albert Jordan applied for reinstatement at Kenton Board and was denied. He filed a timely claim with the United States Department of Labor, and in late August Loretta Townsend of the Department of Labor informed him that he was going to be rehired, but a female co-worker had to be fired to make a position. This was done even though a teacher new to Scott High School was hired in the English department.

At the reemployment interview -then assistant superintendent -now superintendent Neal Stiegelmeyer immediately asked the veteran what the disability was. Albert Jordan informed Neal Stiegelmeyer orally and on the new job application, and he requested in writing accommodations in the form of familiar courses with perhaps a lighter assignment with some administrative duties in lieu of teaching duties since the veteran was still suffering and being treated for physical and mental conditions at the Veterans Administration Medical Center.

On the first day of school Principal Robert Konnerman gave Albert Jordan his teaching assignment. The veteran

complained to the principal and the Department of Labor case worker Loretta Townsend that:

1. Mr. Konnerman stated that he did not want to hear about handicaps.

2. Albert Jordan was not granted a continuing contract.

3. Albert Jordan was assigned a homeroom although his seniority dictated that he should not be assigned one since he had had a homeroom for four years.

4. He was not granted a lighter assignment.

5. He was not granted a familiar teaching assignment.

6. He was not granted salary credit for the partial year of teaching plus the time spent in service.

7. He should have been given the supplemental contract for sponsoring the student newspaper.

In summary the school administration had made the veteran's job more difficult, rather than make the requested accommodations.

It was apparent to Albert Jordan that Kenton Board resented having to comply and early on it established a pattern of non-compliance in which it contested each concession it must make. In the words of Assistant Principal Robert Storer, "we will do whatever we want until some court makes us do otherwise." This same attitude was expressed by the Kentucky Teacher's Retirement System.

Kenton Board of Education not only failed to take affirmative action toward the disabled veteran as required

by Sections 503 and 504 of the Rehabilation Act of 1974, it took negative actions to deny the reemployment rights of the disabled veteran.

Albert Jordan attempted to exhaust every possibility for relief in his relentless quest for satisfaction in this matter. He patiently sought help in a timely manner from various sections of local, state, and federal government only to be run around in circles many, many times. The government, in its many forms, has so far allowed Kenton Board and Kentucky Teacher's Retirement System to avoid the cost of providing Albert Jordan his lawful benefits. Kenton Board and Kentucky Teacher's Retirement System have been allowed to rely on technicalities that they and the government have created. By not reviewing this appeal and restoring the sought after remedy, the Supreme Court is condoning this miscarriage of justice. Then as a result, rather than treating disabled veterans and handicapped workers fairly, employers can distort the facts and blame the victims.

REASONS FOR GRANTING THE PETITION

1. The lower courts abused powers of discretion in denying discovery before summary judgment was granted, which is in violation of federal procedure law which governs the manner in which claims are resolved on summary judgment motion. The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery. *Whites Landing Fisheries, Inc. v. Buchholzer.* There is a compelling concern that a party be permitted an adequate opportunity to discover and present the facts pertinent to his claims. The district court and the appeals court denied Albert Jordan discovery, despite his objections. However to prosecute his case, the veteran Jordan can obtain the evidence required only through the powers of discovery. There is no apparent prejudice to the defendant by conducting discovery. Discovery could possibly establish that Kenton Board and Kentucky Teacher's Retirement System would be truly prejudiced in its ability to defend against this claim. Even more likely, however, discovery could show that they are discriminating as alleged. There should be no doubt that Albert Jordan is prejudiced in his ability to prosecute his claim. This court should rule that there was abuse of discretion by the lower courts because discovery was needed and hence summary judgment was prematurely entered.

2. Kenton Board and Kentucky Teacher's Retirement System discriminated against Albert Jordan on the basis of veteran's status and handicap. This constitutes the denial of equal protection under the Fourteenth Amendment to the Constitution and the laws of the United States.

3. This Court should apply the "escalator principle" of a veteran's seniority established in *Fishgold v. Sullivan* which held that the statute does not give the veteran only the seniority he had when he left, but does give him the seniority he had when he entered military service plus the further seniority he would have accumulated if his employment had continued without interruption by military service.

4. Another element of the *Fishgold* decision that this Court should apply is the Court's declaration that the statute be liberally construed for the benefit of the veteran, and that the statute takes precedence over the collective-bargaining agreement.

5. Most importantly the Court should let Albert Jordan have "his day in Court." Thus far the courts have unfairly dismissed the claim on technicalities before the veteran could present his case.

6. Kenton Board of Education should be required to show that it used affirmative action towards the employment of Albert Jordan. Actually Kenton Board is in violation of Sections 503 and 504 of the Rehabilitation Act of 1974. Rather than making job openings available to a known-

disabled veteran (Albert Jordan) Kenton Board has taken "negative action." It has not informed the local employment office of job openings as required by law. Most nefariously, Kenton Board has hidden and lied about the fact that it has federal contracts of $10,000 or more to the Department of Labor. Obviously Kenton Board administrators prefer to take federal funds and still retain the ability to hire employees arbitrarily at their own discretion.

7. The Court should require Kenton Board to reemploy Albert Jordan as a disabled veteran with all of the benefits, rights, and protections provided to veterans under federal law, not merely to their interpretations of Kentucky state statutes as administrators responded to the Department of Labor in 1982. This would then be constitutional.

8. Veterans rights and protection are being eroded because veterans are delayed by the government in obtaining reemployment rights and then the delay is held against them. Many veterans lose their rights because they are misinformed, frustrated, and vexed into abandoning their claims.

9. Many employers, particularly Kenton County Board of Education, have little or no respect for the federal rights of veterans by trying to impose state laws that offer less protection than federal law.

10. Many employers, particularly Kenton County Board of Education, actually show contempt for the rights of veterans

in the form of negative action instead of affirmative action.

11. Employers, particularly Kenton Board of Education, want to frustrate and delay veterans who have a just claim in order to make those veterans abandon their claims, die, or commit a legal error that would save the employer the cost of providing the just relief the veteran seeks.

12. School boards rely on their own interpretations of state law to deny veterans benefits.

13. State law is vague on many issues pertaining to this claim.

14. This court should compare the laws of Kentucky to the laws of the other states in the providing of benefits to veterans, so as not to penalize a veteran merely for living in Kentucky if other states provide benefits under the same circumstances.

15. This Court should compare the decisions of the Sixth Circuit Court of Appeals to other Appeals Courts to provide a homogeneity of benefits to all veterans, no matter where they live.

16. Many disability pension providers rely on their own interpretations of state law to deny benefits.

17. Kenton Board of Education has demonstrated a "pattern of non-compliance" in which it will administrate by whim until a court or government agency compels it to comply to rules which may be costly or inconvenient.

18. Kentucky Teacher's Retirement will only pay disability claims it is compelled to pay.

19. Kenton Board, although it has agreed not to discriminate against the disabled by receiving federal funds, has shown contempt and disregard for the civil rights of the handicapped.

20. The federal government needs to bring Kentucky statutes pertaining to veterans in line with federal law.

21. This Court can discourage employers from using selective record-keeping to defeat the rights of disabled veterans and other handicapped citizens.

QUESTIONS PRESENTED

1. In order to enter the Navy, teacher Albert W. Jordan resigned his position as English/Journalism teacher which included a supplemental contract for sponsoring the student newspaper. Should the school system have reinstated him in his former position at the same rate of pay, including the supplemental contract, or was it acceptable to assign him merely the duties of another English teacher who resigned?

2. Albert Jordan maintains that he stated his disabilities and requested accommodations on his application for reemployment which is a primary document in a teacher's employment file. Kenton Board officials reported that this document along with the previous year's supplemental contract was missing from the veteran's file and that they could not remember Mr. Jordan stating his disability or requesting accommodations. Can an employer use selective recordkeeping as a defense against providing accommodations to a handicapped employee?

3. Must the disabled person bear the burden of proving that he stated his disability and requested accommodations when key documents which the government requires the employer to maintain are inexplicably missing? Although it would take a stretch of the imagination to believe, assuming that Kenton Board administrators were unaware (as they claim) of Albert Jordan's handicaps at the outset of his reemployment (especially since he complained about this to the Department of Labor) would it be incumbent on Kenton Board to take

positive steps to ascertain what the veteran's handicaps are and how to accommodate them? Since the Department of Labor informed Kenton Board it was required to rehire Albert Jordan because he was injured in the military, would it have been prudent to require a pre-employment physical which is a customary hiring practice? Can Kenton Board use ignorance of the veteran's disabilities as a defense when one takes into account that the veteran has facial disfigurements for which the Veterans Administration compensates him?

4. If the disabled veteran's disabilities were not officially recognized by the Veterans Administration at the beginning of reemployment, but the Veterans Administration recognizes the handicaps later retroactively, should the veteran bear the consequences of being rehired under a mistake?

5. Should the disabled veteran be reemployed again under the protection of a disabled status with accommodations?

6. Can the employer use the period of reemployment to discourage the veteran and drive him off, or must the veteran be given a fair chance to gain seniority? Can he be harassed? What constitutes harassment under the Veterans Reemployment Rights Act?

7. Can the employer merely use the reemployment period to "prove" that the veteran would not have attained tenure status if he had not entered military service? As "proof" that Albert Jordan would not have attained tenure, Kenton Board provided the Office of Civil Rights three files of

teachers who were denied tenure. Would it be more fair and logical to examine the files of all teachers in the Kenton County Board system who began teaching in 1978 as did Mr. Jordan and then make comparisons? Must the reemployed veteran bear the burden of proving the impossible -- that he absolutely would have obtained tenure had he stayed on the job? What if the employer has demonstrated a "pattern of non-compliance" in which it contests entitlement to every right or benefit? Can the employer then be trusted to make a fair assessment on the tenure issue?

8. Albert Jordan protested to Department of Labor what he considered violations of the employment contract during his reemployment period. Kenton Board's defense to Department of Labor investigators was that the administrators were using the same tactics they had used during Jordan's pre-service employment. Is it permissible under the Veterans Reemployment Rights Act for an employer to violate the employment contract during a veteran's reemployment if it had done so during pre-service employment?

9. Is a nine-month school term twelve months of reemployment guaranteed by the Veterans Reemployment Rights Act?

10. Can an employer "harass" a reemployed veteran with unlimited evaluation and supervision? How much supervision is excessive in a teaching situation?

11. What constitutes harassment?

12. How does a veteran's reemployment affect his qualifying for teacher tenure? Can the employer rely on claiming that the reemployed veteran would not have gained tenure based on subjective after-the-fact judgments if there was no basis or conduct established and documented before his resignation and entry into the military?

13. If a returning veteran who had been injured in the military is reemployed under protection provided to non-disabled veterans and he is later retroactively recognized by the Veterans Administration and Social Security as being disabled, should he be granted retroactive remedies to non-compliance?

14. If a returning veteran claims he requested reemployment under the protection provided a disabled status and he did so on his reapplication for employment and that application is inexplicably lost by the employer, must the burden of proof be on the veteran to show that this was selective recordkeeping on the part of the employer? And can an employer thus hide behind *laches*?

15. Can a retirement system repeatedly refuse to provide an application for disability benefits within a one-year deadline and later rely on that deadline as a basis for denial of benefits?

16. Is a court in error when it refuses to allow Discovery and then dismisses a Veterans Reemployment Rights claim for *laches*? What if the veteran has requested documents from the Department of Labor under a Freedom of Information Act

request, and the Courts denied the claim on *laches* before the government has provided the information. Note: As of this date, the Freedom of Information Act request was not complied with even though the request was made years ago.

17. Can the Office of Civil Rights decision be used to defeat the claims of a veteran when it relied on anonymous and unsworn testimony on which the veteran was not able to cross-examine the witnesses? Should a denial for representation by the Office of Civil Rights based on a claim filed under the Rehabilitation Act, 29U.S.C. § 794, preclude the veteran from pursuing his rights in federal court on a claim filed under the Veterans Reemployment Rights Act 38 U.S.C. § 4031 *et. seq*?

18. Should the employer be allowed to violate the teachers contract in denying benefits and protection to a reemployed veteran?

19. When the Veterans Reemployment Rights Act is in conflict with state law, which prevails if federal law provides more benefits or protection than state statutes?

20. Can the employer rely on the doctrine of *res judicata* to defeat the rights of a veteran based on an Office of Civil Rights investigation in which testimony was unsworn, false, witnesses were afraid to testify, anonymous information was presented, and witnesses were not compelled to testify or to be cross-examined?

21. Is a disability pension a benefit protected by the Veterans Reemployment Rights Act?

22. Can the doctrine of *laches* be applied to defeat the rights of a veteran if the employer and retirement system did not have "clean hands" and actually contributed to the delay and the lower courts did not allow Discovery?

23. Can the retirement system refuse to provide or accept an application in a timely manner because the injury and resultant disability occurred in the military and not during teaching employment, and then later use the defense that the veteran did not submit an application within the one-year period required by state statute? What if as Mr. Jordan alleges, the injury occurred in military service, however the injury became totally disabling after five years of teaching--the way Social Security recognizes it?

24. Can a retirement system successfully deny a disability claim by holding a veteran to a one-year statute of limitations when the full scope of the veteran's disabilities was not officially recognized until years later? How does retroactive recognition by Social Security and Veterans Administration affect the veteran's coverage under this plan? Should the veteran suffer the loss of benefits because the Veterans Administration and Social Security Administration take years to act?

25. Did the lower courts err by assuming that Albert Jordan abandoned his claim for reemployment by pursuing claims with the Veterans Administration and Social Security? Cannot a veteran simultaneously and continuously pursue reemployment rights benefits and/or disability benefits with the

government, since the Department of Labor informed the veteran that the employer would be required to either reemploy or retire him? If the veteran seeks either reemployment with accommodations or disability retirement, must he receive neither?

26. Was Albert Jordan's dismissal "for cause" when Kenton Board did not provide reasons on his dismissal.? Can the Board legally claim at his firing that the dismissal was "not for cause", then later state to the unemployment agency and the United States Attorney that the dismissal was "for cause"?

27. If this claim poses difficult questions to be resolved should the Courts give the benefit of doubt to the disabled veteran by construing the Veterans Reemployment Right Act liberally?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Kenton County of Kentucky Board of Education

Kentucky Teacher's Retirement System

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Albert W Jordan

Date: November 25, 1996

No. 95-6569 A-1

FILED

SEP - 6 1996

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT W. JORDAN,

Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF EDUCATION; KENTUCKY TEACHERS RETIREMENT SYSTEM,

Defendants-Appellees.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: SILER, MOORE, and COLE, Circuit Judges.

Albert W. Jordan, a Kentucky resident, appeals pro se the judgment for defendants in this action filed under the Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-2027 (now codified at 38 U.S.C. § 4301 et seq.). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On November 3, 1994, Jordan commenced this action by filing a petition to the district court to direct the United States Attorney to represent him in an action under the above Act. The district court construed this filing as a complaint and denied the petition to direct such representation, but allowed Jordan to file an amended complaint. In his amended complaint, Jordan sought reinstatement or disability retirement benefits from the Kenton County Board of Education (Board) and the Kentucky Teachers Retirement System (Retirement System). He alleged that the defendants had violated his reemployment rights during the 1982-83 school year.

A-2

The Board moved to dismiss, raising defenses of laches and issue preclusion, based on a complaint Jordan had filed in 1988 with the Department of Education Office of Civil Rights under the Rehabilitation Act, 29 U.S.C. § 794, which had been rejected at the administrative level. The Retirement System also filed a motion to dismiss for failure to state a claim, pointing out that Jordan had failed to apply for disability retirement within one year of his last employment, as required by Ky. Rev. Stat. § 161.661(1). The district court construed the Board's motion as one for summary judgment, as it was supported by evidence outside the pleadings. It granted both motions, finding that laches barred Jordan's claim and that he had not filed a timely claim for disability retirement benefits. On appeal, Jordan argues that the delay in this case is attributable to the government, and that the United States Attorney should be compelled to represent him.

Upon review, we affirm the judgment for the defendants for the reasons stated by the district court. The Board was properly granted summary judgment based on the defense of laches, as Jordan's inordinate delay in commencing this action resulted in prejudice to the defendant. *See Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1250 (6th Cir. 1991). Jordan was admittedly aware of all the alleged facts on which he bases his claim in 1983, yet he did not commence this action until 1994. It appears that he was busy meanwhile pursuing unemployment benefits and disability benefits from both the Veterans Administration and the Social Security Administration, in addition to his Rehabilitation Act claim. All of these proceedings undoubtedly took a long time to resolve, but this does not excuse Jordan's failure to pursue the relief to which he alleges he was entitled under the Reemployment Act. His argument that the United States Attorney should have been compelled to represent him is unfounded. The statute provides only that the veteran may request such representation. Furthermore, the Board demonstrated the prejudice caused by Jordan's delay, as most of the school officials mentioned in the complaint have since retired, moved away or died, and documentation regarding Jordan's employment has been destroyed. It is therefore apparent that laches bars this claim for Reemployment Rights. *Cf. Farries v. Stanadyne/Chicago*

Div., 832 F.2d 374, 380-82 (7th Cir. 1987) (laches applied to bar Reemployment Rights claim in case of nine-year delay). The Retirement System's motion to dismiss was also properly granted, as Jordan simply failed to apply for disability retirement benefits within one year of the date he last worked, as required by Ky. Rev. Stat. § 161.661(1). The fact that he had inquired about disability benefits before he became eligible to apply for them did not relieve him of the requirement of applying after attaining eligibility.

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NUMBER 95-6569

ALBERT W. JORDAN
DISABLED VETERAN — APPELLANT

VS.

KENTON COUNTY BOARD OF EDUCATION
AND
KENTUCKY TEACHER'S RETIREMENT SYSTEM — APPELLEES

ON APPEAL FROM THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DISTRICT

****

REQUIRED STATEMENTS FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit (or the Supreme Court of the United States) and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Witty v. Louisville & Nashville Railroad Co., 342 F.2d 614, 51 LC

Conseglio v. Pennsylvania Railroad Co., 211 1F. supp 567, 46 LC 17, 948, 51 LRRM 2693 (S.D. N.Y., 1962)

Muscianese v. United States Steel Corp., 354 F. Supp. 1394, 70 LC 13, 342, 82 LRRM 2922 (E.D. Pa. 1973)

Smith v. Continental Airlines, Inc., 70 LC 13, 501, 82 LRRM 2938 (C.D. Calif., 1973)

Alfarone v. Fairfield Stratos Corp., 218 F. Supp. 446, 47 LC 18, 361, 53 LRRM 2634 (E.D. N.Y., 1963)

Carter v. United States, 407 F. 2d 1238 (C.A. D.C., 1968)

Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169, 48 LC 18, 747, 55 LRRM 2369 (1964);

Brooks v. Missouri Pacific Railroad Co., 376 U.S. 182, 48 LC 18, 948, 55 LRRM 2374 (1964)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. How can the motion for summary judgment be properly granted when there was a need for facts because Discovery was not allowed?

2. How can the doctrine of *laches* be properly applied when the court did not grant discovery to determine whether the defendant Kenton Board of Education was truly prejudiced?

3. How can *laches* be applied when it was proven that defendant Teacher's Retirement System did not have "clean hands" by causing the delay?

4. How can *laches* be applied as a defense for the Kenton Board of Education when it did not have "clean hands" and selectively maintained records and lied, causing the delay the entire scope of which was not discovered until 1994?

5. How can *laches* be applied when government officials did not have "clean hands" when they with-held information and misinformed the veteran Albert Jordan?

6. How can the U.S. attorney Louis DeFalaise not be held accountable when he deliberately prevented Albert Jordan from filing a *pro se* action in U.S. District Court by misrepresenting the truth in 1983?

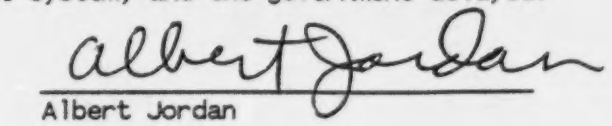
7. How can the courts properly dismiss Albert Jordan's claim for disability benefits on the grounds that application was not made in a timely manner when the Retirement System refused to accept one so that it could later deny him benefits on that basis?

8. How can Albert Jordan receive a fair hearing when fact-finding through Discovery was not permitted probably so that the true workings of the Department of Labor and other agencies be revealed as their underhanded methods would come to light?

9. How can a veteran get a fair hearing when the employer and the retirement system are permitted to misrepresent the facts, and the courts are eager to accept their false version of the truth?

10. How can the legal system itself not be held partially responsible for the delay when private attorneys distorted the truth and added to delay when they are paid by the hour?

11. How can the courts find that Albert Jordan caused an inordinate delay when the truth is Albert Jordan went to the government in 1983 and has continuously sought to get relief while the Kenton Board of Education, the Retirement System, and the government delayed?



Albert Jordan
pro se

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NUMBER 95-6569

ALBERT W. JORDAN
DISABLED VETERAN — APPELLANT

VS.

KENTON COUNTY BOARD OF EDUCATION
AND
KENTUCKY TEACHER'S RETIREMENT SYSTEM — APPELLEES

ON APPEAL FROM THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DISTRICT

PETITION FOR REHEARING *EN BANC*

Comes now the appellant, Albert W. Jordan, requesting a rehearing *en banc*. In the Sixth Circuit Appeals Court's decision no comment or discussion addressed the issues brought forth by the appellant.

In particular, the Appeals Court could explain the fairness of requiring the veteran to submit an application for disability retirement when the teacher's retirement system steadfastly refused to accept one in a timely manner. This is in effect requiring the impossible, after the fact.

Furthermore, the *en banc* panel could explain the fairness of requiring the veteran to provide evidence of his continuous effort to seek justice in this matter when the federal government in all its various forms has refused to cooperate by submitting its records or by compelling hostile witnesses to testify under oath. How can the appellant document his case when there was no Discovery or powers of subpoena?

Basically the System sets up the veteran for a default by keeping him in the dark by disinformation or misinformation or no information.

When asked specific information relevant to a reemployment rights claim, the administrators "dummy up." Coincidentally no administrators in the federal government seem to know of any veteran whose situation is even remotely similar to mine because my situation (which involves a veteran who cannot get his employer and retirement plan to provide benefits) is so very rare. Common sense would say that out of the millions of veterans that been discharged, surely many of them encountered some resistance in obtaining reemployment rights. No one in the government has complied with my many requests for information on this subject. Apparently by the appellate court's decision to prevent full publication of my case it intends to suppress my testimony so that veterans who follow me will not benefit from reading about Albert Jordan's experience. It is obvious that regardless of what is proven, the government would find some basis for denial, no matter how far it would have to stretch.

Therefore this appellant honorably requests the Court to publish the full text of these proceedings in order for the truth to be told about how veterans are treated. This case has nothing to do with justice or fairness; rather it is about whip-sawing and distorting and repressing the facts so that the government can blame the victim.

Possibly you can convince yourselves and each other and the public that this was a fair hearing, but I shall never be convinced. Even if there is a settlement in my favor, I believe it will be too little, too

late, and it will come only after many years of the worst imaginable mental anguish.

Respectfully submitted,

Albert W Jordan

Albert W. Jordan

CERTIFICATION

I hereby certify that I have, this 12th day of September, 1996 mailed a copy of the foregoing to:

James M. Baker, Esq.
479 Versailles Road
Frankfort, KY 40601

and

Donald J. Ruberg
209-C Thomas More Park
P.O. Box 17411
Covington, KY 41017-0411

Albert W. Jordan

Albert W. Jordan
5855 S. Herringer Road
Alexandria, KY 41001

606-635-1337

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 23 1996

LEONARD GREEN, Clerk

ALBERT W. JORDAN,

Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF EDUCATION, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: SILER, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

EASTERN DISTRICT of KENTUCKY
FILED
OCT 11 1995
AT COVINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 94-202

ALBERT W. JORDAN — PLAINTIFF

VS.

KENTON COUNTY BOARD OF EDUCATION
AND
KENTUCKY TEACHERS' RETIREMENT SYSTEM — DEFENDANT

ORDER AND OPINION

This matter is before the court on defendants' motions to dismiss (docs. # 14 and #19). For the reasons set forth below, the Kenton County Board of Education is entitled to summary judgment, and Kentucky Teachers' Retirement System's motion to dismiss must be granted.

Plaintiff, Albert W. Jordan, was employed by the Kenton County Board of Education as a teacher and football coach at Scott High School beginning in August, 1978. In February, 1982, Plaintiff resigned his position at Scott High School in order to enter the military. Plaintiff was injured on June 17, 1982, while participating in activities in the Navy. Plaintiff was honorably discharged from the Navy after the injury.

Plaintiff applied for his former job as a teacher with the Kenton County Board of Education. Kenton County rehired Plaintiff, and he began work on September 2, 1982. Plaintiff objected to the work load as well as his assignment claiming that his disability required an easier work load and that he was not reinstated to the same position. Plaintiff claims that he was harassed by staff at Scott High School based on his disability as evidenced by the fact

that he was frequently observed in the classroom by other faculty members. Kenton County discharged Plaintiff in June, 1983.

As a teacher in Kentucky, Plaintiff was a member of the Kentucky Teachers' Retirement System ("KTRS"). KTRS provides benefits and pensions to disabled or retired teachers in the Commonwealth.

When Plaintiff resigned from Kenton County to enter the military on March 2, 1982, he had 3.69 years of service credit with KTRS. Plaintiff terminated his relationship with KTRS at this time and received a refund of his retirement distributions on April 12, 1982. After Plaintiff was returned to his position with Kenton County, he reinstated his 3.69 years of service with KTRS. Plaintiff purchased a .31 year of service credit for his military service and for the balance of the school year 1981-1982 on June 27, 1983. Plaintiff obtained five years of service on June 30, 1983, his last day of service for Kenton County.

After Plaintiff was discharged from Scott High School and denied benefits from KTRS, he sought relief from the United States Department of Education, Office for Civil Rights under the Rehabilitation Act of 1973. On August 15, 1988, the Department of Education determined that Plaintiff was not entitled to relief. In addition, Plaintiff was denied disability benefits by KTRS on a number of occasions dating back to May 2, 1983.

KENTON COUNTY'S MOTION FOR SUMMARY JUDGMENT

As implied above, Kenton County's motion to dismiss will be considered as a motion for summary judgment because it relies on

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the affidavit of Neil Stiegelmeyer. Rule 12(b) of the Federal Rules of Civil Procedure provides that if material outside the pleadings are presented and not excluded by the Court, the motion is to be treated as a motion for summary judgment as described in Rule 56 of the Federal Rules of Civil Procedure.

Kenton County argues that Plaintiff is barred by the equitable doctrine of laches because Plaintiff failed to bring suit until 13 years after the cause of action arose. Kenton County argues that 13 years constitutes inexcusable delay which has prejudiced Kenton County. For the reasons set forth below, Kenton County's argument is well taken.

In Stevens v. Tennessee Valley Auth., 712 F.2d 1047 (6th Cir. 1983), the plaintiff sued his employer under the Veterans Preference Act for reinstatement to his position after leave for military service. The Sixth Circuit stated that the Veterans Preference Act was analogous to the Veterans Reemployment Act in that Congress did not provide a statute of limitations for either statute. In the Veterans Reemployment Act, specifically, Congress stated that "no state statute of limitations shall apply to any proceeding under this chapter." 38 U.S.C. § 2022.

To prevail on a laches defense, a defendant must prove: (1) the plaintiff's delay in bringing the suit is inexcusable; and (2) the defendant was prejudiced by the delay. Wells v. United States Steel & Carnegie Pension Fund, Inc., 950 F.2d 1244 (6th Cir. 1991). In determining whether laches acts to bar an action, the Court should consider "the length of the delay, the reasons therefor, how

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the delay affected the defendant, and the overall fairness of permitting the assertion of the claim." Stevens, 712 F.2d at 1056.

There is no fixed time period for determining whether laches operates to bar a claim. Stevens, 712 F.2d at 1056. The Court must look at the circumstances of the case and determine what is equitable. However, comparison with a statute of limitations may be a guide or an element for the Court to consider in determining whether barring the claim is the equitable result. Goodman v. McDonnell Douglas Corp., 606 F.2d 800 (8th Cir 1979). Whether laches should be applied is left to the discretion of the district judge. Erlanger v. Berkemeyer, 207 F.2d 832, 840 (6th Cir. 1953).

There are several cases which address the issue of laches as it applies to the Veterans Reemployment Act and the Selective Training and Service Act, its predecessor. Delays of the following lengths of time have been considered unreasonable or inexcusable: nine years (Ligenfelter v. Keystone Consolidated Industries, Inc., 691 F.2d 339 (7th Cir. 1982) and Gruca v. U.S. Steel Corp., 495 F.2d 339 (7th Cir. 1982)); nine years after discharge and six years after discharge was upgraded to honorable (Farries v. Standyne/Chicago Division, 832 F.2d 374 (7th Cir. 1987)); seventeen years (Carmalt v. General Motors Acceptance Corp., 302 F.2d 589 (3rd Cir. 1962)).

To the contrary, the delay was not unreasonable where the plaintiff diligently sought relief from the Department of Labor within two years of accrual of the action and filed a complaint within five years. Stewart v. U.S. Steel Corp., 594 F.Supp. 180

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(N.D. Ind. 1984). Similarly, delays of two and a half years and four years were not considered unreasonable. Lemmon v. Santa Cruz, 686 F.Supp. 797 (N.D. Cal. 1988); Milacone v. Long Island R.R. Co., 582 F.Supp. 973 (S.D.N.Y. 1983).

In Blake v. Columbus, 605 F.Supp. 567 (S.D. Ohio 1984), the Court held that, under the Veterans Reemployment Act, the plaintiff's delay was unreasonable. The Court stated as follows:

> The Court believes the period from April 1968 through July 1971 during which plaintiff was actively negotiating with defendant to resolve the dispute concerning his employment status, to be reasonable delay. In addition, that period of time from December 1975 through September 1976, during which plaintiff was engaged in discussion with the department concerning his status in "active" versus "continuous" service is also excusable delay. Similarly, the period between 1981 to 1983 during which the United States Attorney's office was attempting to negotiate a settlement between the parties is not charged to the plaintiff . . . **However, when coupled with the subsequent five-year period from 1976 through 1981 in which the plaintiff sat on his rights, the entire delay becomes unreasonable.**

Id. at 570 (emphasis added)(citations omitted).

Based on the authorities set forth above, Plaintiff's 13-year delay in bringing this action was unreasonable. Even though he proceeded initially before the Department of Labor, that agency issued its decision in 1988. The Plaintiff waited an additional five years prior to filing this action. Because Plaintiff "sat on his rights" for five years after the Department of Labor issued its decision, Plaintiff's delay is unreasonable.

To prevail on a laches defense, the defendant must prove that it has been prejudiced by the delay. Stevens v. Tennessee Valley Auth., 712 F.2d 1047 (6th Cir. 1982). To establish the required

prejudice, Kenton County offers the affidavit of Neil Stiegelmeyer (doc. # 15). This affidavit identifies specific witnesses that are no longer available and describes specific records that are no longer in the necessary files. For example, various staff members are no longer employed by Kenton County; one witness is now deceased, while another lives in Texas; records in Plaintiff's personnel file have been limited since the cause of action accrued; and many notes and documents concerning this matter have been discarded.

For these reasons, Kenton County has established that it has been prejudiced by Plaintiff's delay in bringing this claim. Therefore, Plaintiff's claim is barred by the equitable doctrine of laches, and Kenton County's motion for summary judgment must be granted.

KTRS' MOTION TO DISMISS

KTRS argues that Plaintiff's amended complaint should be dismissed because Plaintiff failed to conform with the procedures for collection of disability benefits set forth in K.R.S. 161.661(1). K.R.S. 161.661(1), as it read in June, 1983, provides as follows:

> (1) Any member who has completed five (5) years of accredited service in the public schools of Kentucky after July 1, 1941, may retire for disability and be granted a disability allowance if found to be eligible as provided below. Application for disability must be made within one (1) year of the last contributing service in Kentucky, and the disability must have occurred during the most recent period of employment in a position covered by the teachers' retirement system and subsequent to the completion of five (5) years of teaching service in Kentucky.

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K.R.S. 161.661(1). The requirements of this statute may be summarized as follows: (1) an application for benefits must be made within one year of the last service performed in Kentucky; (2) disability must have occurred within the most recent period of employment; and (3) the teacher must have completed five years of service prior to becoming disabled. K.R.S. 161.661(1).

Although no Kentucky court has addressed the issue at bar, the Kentucky Attorney General has issued an opinion addressing a similar issue. OAG 79-49 (Jan. 22, 1979). In that case, the plaintiff, who was terminated from his teaching position in June, 1976, brought a civil action challenging his termination. Nearly two years later, the court determined that his claim was without merit. The plaintiff first sought disability payments in 1978, after the judicial proceedings terminated. The Attorney General stated that the plaintiff could not recover benefits because he failed to apply for the benefits within the one year statutory period, stating:

> [T]he clear language of the statute [161.661] can not [sic] be circumvented. It would appear that [the plaintiff] consciously chose not to comply with the statute, and instead proceeded with his attempt to regain employment. I cannot see any room in the statute to ignore the one year time limitation requirement.

Id.

In the case at bar, KTRS determined that Plaintiff's last day of service in Kentucky was June 30, 1983. Under K.R.S. 161.661(1), Plaintiff was required to file an application with KTRS by June 30, 1984. Plaintiff failed to meet the one year limitation period; therefore, his claim is barred.

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Plaintiff does not argue that he complied with the one year limitation requirement of the statute. Instead, he argues that he failed to meet the one year deadline because KTRS refused to provide him with an application in a timely manner. Plaintiff asserts that KTRS should be estopped from asserting the time limitation requirement based on its misconduct.

Based on the Kentucky Attorney General opinion discussed above, any alleged misconduct or other delay in providing an application does not dispel the "clear language of the statute." It is obvious that Plaintiff was aware that he had to file an application with KTRS, but he failed to do so within the statutory period. Accordingly, his claim for benefits is barred.

Therefore, the Court being advised, it is hereby ordered as follows:

1. Kenton County Board of Education's motion to dismiss (doc. # 14), which the court considered as a motion for summary judgment, is granted; and

2. KTRS' motion to dismiss is granted. A separate judgment will be entered concurrently herewith.

This 11th day of October, 1995.

William O. Bertelsman

WILLIAM O. BERTELSMAN, CHIEF JUDGE

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EASTERN DISTRICT of KENTUCKY
FILED
OCT 11 1995
AT COVINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 94-202

ALBERT W. JORDAN — PLAINTIFF

VS. — JUDGMENT

KENTON COUNTY BOARD OF EDUCATION, ET AL — DEFENDANTS

Pursuant to the Order and Opinion entered concurrently herewith, and the court being advised,

IT IS ORDERED AND ADJUDGED that the complaint and amended complaint be, and they are, hereby **dismissed**, with prejudice, and **stricken** from the docket of this court, at the cost of the plaintiff.

This 11th day of October, 1995.

William O. Bertelsman

WILLIAM O. BERTELSMAN, CHIEF JUDGE

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APPENDIX D

EASTERN DISTRICT of KENTUCKY
FILED
NOV 22 1995
AT COVINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 94-202

ALBERT W. JORDAN — PLAINTIFF

VS. — ORDER

KENTON COUNTY BOARD OF EDUCATION, ET AL — DEFENDANTS

This matter is before the court on the motion of plaintiff for reconsideration of this court's Judgment entered herein, and for reasons stated in this court's Opinion and Order, entered concurrently with the Judgment, the court being advised,

IT IS ORDERED that said motion for reconsideration (Doc. #26) be, and it is, hereby **denied**.

This 22d day of November, 1995.

William O. Bertelsman

WILLIAM O. BERTELSMAN, CHIEF JUDGE

FACTSHEET

EMPLOYER SUPPORT OF THE GUARD AND RESERVE

NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE

QUESTIONS AND ANSWERS ABOUT REEMPLOYMENT RIGHTS

(This Fact Sheet Does Not Address Training Duty)

1. Question: If I left my civilian job to go on active duty in support of a military operation, will I have the right to get my job back?

Answer: Yes, if you meet the five eligibility requirements under the reemployment law:

1. The job you left must be "other than temporary." Jobs with federal, state or city/county governments and private employers are protected.
2. You must have left the job for the purpose of entering active duty.
3. You must serve satisfactorily and be released from active duty.
4. If you were on active duty under the authority of 672 (d), you have 90 days to request reemployment. Members activated under 673 (b), are advised to apply within 31 days. *In all cases, you should contact your employer as soon as possible after release from active duty.*
5. Your total amount of active duty (other than training duty) since going to work for your current employer cannot exceed four years, unless extended by the period of time the President authorizes the call-up of Reserve units/individuals, or if you cannot obtain orders relieving you from active duty.

2. Question: When I am released from active duty, what do I have to do to get my job back?

Answer: After your release from active duty and within 90/31 days (see Answer 1, part 4 above), go to your place of employment and tell someone in authority:

1. I used to work here.
2. I left my job to enter active military service.
3. I have been released from active duty under honorable conditions and I want my job back. (Take your DD-214 or DD-220 Discharge Certificate if you receive one, because it shows the dates and character of your military service.)

3. Question: Do I lose my reemployment rights if I volunteered for active duty?

Answer: No. Your job is protected as long as you receive orders to perform active duty, whether your service is voluntary or involuntary.

NCESGR
1555 Wilson Boulevard, Suite 200
Arlington, Virginia 22209-2405
(800) 336-4590
(Autovon) 226-1400
(703) 696-1400

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4. Question: Do I have to tell my employer when I am going and when I will return?

Answer: No. It is a good idea to give your employer as much information as you can about the length of your absence when you are ordered to active duty, but sometimes this is impossible. *NOTE: If you are ordered to active duty for training or inactive duty training, however, you must request a leave of absence.*

5. Question: Will I have to wait to get my job back?

Answer: No. Your employer should reemploy you when you apply, but sometimes it can take as long as two weeks for your employer to make the necessary arrangements.

6. Question: What kind of job am I entitled to upon reemployment?

Answer: You are entitled to the job you left or a similar job, with the same seniority, status and rate of pay you would have had if you had stayed on the job instead of going on active duty. If you would have been promoted during your absence, you may be entitled to the promotion. If you would have been laid off, the position/status you return to may be in layoff.

7. Question: Does my employer have to pay me or provide health insurance or other benefits while I'm on active duty?

Answer: Some employers provide limited paid military leave or make up the difference between regular and military pay. Most employers have no obligation to provide pay or benefits unless they provide them to other employees on leave or furlough. The IRS advises that an employer's COBRA obligation to continue health coverage is the same for Reservists as for other employees (IRS Notice 90-58). Public Law 102-12, signed March 18,1991, stipulates that Reserve Component members and their qualifying dependents are entitled to immediate reinstatement of company-sponsored health insurance upon return from military duty. Waiting periods and "pre-existing conditions" exclusions are prohibited. This protection is effective retroactive to August 1, 1990.

8. Question: If I apply for reemployment, what's to keep my employer from reemploying me and then finding an excuse to get rid of me later?

Answer: The law gives you a period of protection against discharge without cause. If you are fired during that period, your employer will have to prove that other employees are fired for the same kind of reason, and that you actually did what the employer accused you of doing. The special period may be six months or one year, depending upon the legal authority for your active duty.

9. Question: Where can members of the National Guard and Reserve get more information about their job rights or get help if they feel these rights have been denied?

Answer: For information or assistance on their job rights, Reservists may contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) toll-free at (800) 336-4590 or for the nearest office of Veterans' Employment and Training Service, United States Department of Labor, call (800) 442-2838.

U.S. Department of Labor
Program Highlights

Fact Sheet No. OASVET 90-10

REEMPLOYMENT RIGHTS FOR RETURNING VETERANS

Under the Veterans' Reemployment Rights (VRR) law, a person who leaves a civilian job in order to enter active duty in the Armed Forces, voluntarily or involuntarily, is entitled to return to his civilian job after his discharge or release from active duty if he or she meets the five basic eligibility criteria of the VRR law:

1. He or she must hold an "other than temporary" civilian job. (The job need not be "permanent.")

2. He or she must leave the civilian job for the purpose of going on active duty.

3. He or she must not remain on active duty longer than four years, unless the period beyond four years (up to an additional year) is "at the request and for the convenience of the Federal Government."

4. He or she must be discharged or released from active duty "under honorable conditions."

5. He or she must apply for reemployment with the pre-service employer or successor in interest within 90 days after separation from active duty.

A person meeting these criteria is entitled to reinstatement within a reasonable time to a position of like seniority, status, and pay. Additionally, a returning veteran may be entitled to a better job than the one he or she left. In its first case construing the VRR law, the Supreme Court stated, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." This explanation, which is known as the "escalator principle," was later expressly ratified by Congress. Benefits generally found to be based on seniority, i.e., length of service, are pensions, pay increases, missed promotions and missed transfers. Additionally a veteran who returns from the service to a different employer in the same industry covered by the same multi-employer pension plan remains covered by that plan and is entitled to military service pension credit.

This is one of a series of fact sheets highlighting U.S. Department of Labor programs. It is intended as a general description only and does not carry the force of legal opinion.

Although the "escalato. normally goes up or remains in place, there are times when it goes down. If the employer can establish that the veteran would have been downgraded if he had remained continuously employed, he will be entitled to reemployment in the lower job. If the employer can establish that the veteran would have been laid off in accordance with seniority, he may be entitled to "reinstatement" into a layoff position, with recall rights. If the employer can establish that the veteran's pre-service employment relationship would have been severed altogether, the veteran may be entitled to no job at all, but he might be entitled to severance pay. The whole point of the VRR law is to place the returning veteran in the job he or she would have attained if he or she had remained continuously employed instead of going on active duty. Upon reemployment, a veteran may not be discharged without cause for a period of one year.

The VRR law applies to persons who are inducted (drafted) into the Armed Forces, to persons who volunteer directly for active duty, and to Reservists and members of the National Guard who are called to active duty voluntarily or involuntarily. In addition to performing active duty, reservists and members of the National Guard also perform initial active duty training, active duty for training, and inactive duty training.

Reemployment rights for persons performing these kinds of duty is discussed in the Department of Labor fact sheet OASVET No. 90-9, entitled "Job Rights for Reservists and Members of the National Guard."

When a person leaves a civilian job in order to perform active duty, he or she is not required to request a leave of absence or even to notify the employer that military service is the reason the person is leaving the civilian job, although such a person should be encouraged to provide the employer as much information as possible. However, a Reservist or member of the National Guard must request a leave of absence when he or she leaves the civilian job to perform active duty for training or inactive duty training.

The VRR law is enforced by the Department of Labor, Veterans' Employment and Training Service. Attached is a list of the addresses and telephone numbers of offices to contact. If you have any further questions, or if you desire assistance securing your reemployment rights, if any, you should contact the office closest to you.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT JORDAN - PETITIONER
DISABLED VETERAN

VS.

KENTON COUNTY OF KENTUCKY- RESPONDENT(S)
BOARD OF EDUCATION, ET AL

PROOF OF SERVICE

I, Albert W. Jordan, do swear or declare that on this date, November 25, 1996, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR A LEAVE TO PROCEED AS A VETERAN, PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

James M. Baker, Esq.	Donald J. Ruberg
479 Versailles Road	209-C Thomas More Park
	P.O. Box 17411
Frankfort, KY 40601	Covington, KY 41017-0411

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1996.

Albert W. Jordan